SOAH DOCKET NO. 582-08-0523
TCEQ DOCKET NO. 2007-0768-AIR-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE STATE OFFICE**
VS.	§	**OF**
ADVANTAGE ASPHALT PRODUCTS, LTD., RESPONDENT	§	**ADMINISTRATIVE HEARINGS**

RESPONDENT'S EXCEPTIONS TO PROPOSAL FOR DECISION

A. FACTS

1. This case involved four (4) alleged violations. The first alleged that Advantage Asphalt (hereinafter "Advantage") failed to notify "prior to locating at a site" specifically Crusher No. 3 at Irlbeck on 3 occasions and at BFI on one occasion. Violation 2 alleged that Advantage failed to keep operating hours as specifically required by permit and necessary for determining compliance at Irlbeck. The ED alleged 21 monthly events from November 25, 2005 through August 3, 2007 with a base penalty of $21,000.00 or $1,000.00 per monthly event. Violation 3 alleged that Advantage failed to keep operating hours as specifically required by permit and necessary for determining compliance at BFI. There were 14 monthly events alleged at BFI from June 9, 2006 through August 3, 2007 with a base penalty of $14,000.00 or $1,000.00 per monthly event. Finally, violation 4 alleged that Advantage had insufficient record-keeping for BFI and Irlbeck. There was 1 alleged event for each site.

2. This enforcement action originally began in March 2007 after Joe Campa, TCEQ Enforcement officer noted a crusher operating at a site and after determining that Advantage had not provided notice of a move issued a Notice of Violation for operating without a permit for two days with a base penalty of $10,000.00 per day. After two years of discovery, the ED Amended the Petition and abandoned the original violation of operating without a permit and amended to include the violations at issue here. Advantage has maintained and continues to maintain that the violations reflected in this action were based in large part on records that it had no obligation to provide due to the fact that there is only an obligation to keep records for a rolling 24 month period. The ED has approached this case with an absolute sense of entitlement without any reference to the rules that it has promulgated. Further, Advantage provided the production records not because it was "legally" obligated under its permit as suggested by the ED; but in a spirit of good faith efforts to cooperate with the ED in determining whether the permits were valid at the time of the violation. The ED asserts that the severity of the violation is major because of the fact that they could not determine compliance based on the records; however, it is important to note that in March 2007 a new Tier II permit was issued and there is no question that at the time of the on-going and ever changing effort to determine the validity of the old Tier II permit Advantage was in compliance with the new permit. Also, the ED abandoned the violation for operating without a permit when it amended its complaint in January 2010.

3. The Penalty Policy of the TCEQ clearly states that Respondents are to be given good-faith consideration for efforts to comply if certain criteria are met. Advantage revised its record-keeping in January 2007. Those record have been produced and there are no violations associated with the revised efforts of record-keeping except to the extent that the ED refuse to acknowledge or even consider the records from January 2007 through August 2007 because of an error in producing the records at the initial stages of discovery.

B. VIOLATIONS

(1) Allegation 1 – Failure to Notify of Move – 4 violations

4. Advantage conceded this violation and the penalty at trial.

(2) Violation 2 – Failure to keep operating hours - Irlbeck

5. The ED has alleged 21 monthly events at the Irlbeck site. The documentary evidence, as well as the oral testimony from Advantage, established by a preponderance of the evidence that Crusher No. 3 was not located at Irlbeck for 21 consecutive months. The TCEQ refused to admit that there is no duty to keep production records, specifically hours of operation, when the crusher is either not located at the facility or is out of production. The ED proposes, and the Court adopts an interpretation that requires Advantage to keep records "demonstrating compliance" when there is no industrial activity. The Court notes that the Respondent is mistaken because the penalty is calculated on the basis of an on-going failure to demonstrate compliance with the operating restrictions contained in the permit. However, both the ED and the Court dismiss out of hand the argument that when there is no activity, i.e. the crusher is not physically located at the plant, there should be no duty to maintain records; nevertheless, the ED suggests and the Court adopts an interpretation that allows enforcement and violations against a permit holder when no activity is present.

6. Assuming for the sake of argument that the ED is correct and that the records did fail to demonstrate compliance with the permit, it defies logic to assume that there is a violation for every month that Advantage had the permit in effect. However, a review of the records produced, even acknowledging deficiencies, demonstrates that from December 2005 to March 2007 the crusher operated a total of 115 non-consecutive days, which is clearly within the permit. The records also establish that during that time period the crusher was located at Irlbeck for only 14 months and was operational for only 8. During that time period, days of operation were routinely kept. Hours of operation were recorded for 4 of the 8 months. Yet, the ED proposes, and the Court adopts, an interpretation of the rules that allows for a penalty for 21 monthly events from November 2005 through August 2007. This ruling ignores the fact that in January 2007 the record-keeping practices were corrected to alleviate the exact concerns for which Advantage is being penalized. It ignores the fact that these corrections were made prior to any investigation by the TCEQ and/or the ED into the records of Advantage. The ED proposes and the Court adopts a ruling that penalizes Advantage for failing to demonstrate compliance through August 2007, even though a new permit was issued in March 2007 for the Irlbeck site.

7. The proposed decision of the Court ignores the undisputed facts in the case and amounts to an abuse of discretion by the Court.

8. Further, the good faith criterion was not applied to any penalty calculation. The TCEQ penalty policy clearly indicates that if a permit holder is out of compliance and takes steps to bring their operation within compliance then the permit holder is entitled to consideration for good faith compliance. The ED began an investigation in 2007 for operating without a permit. It was not until 2010 that the ED amended its complaint to allege deficiencies in record keeping. Specifically, violation number 2 was not a consideration until 2010. In January 2007, after an internal review, Advantage modified its procedures for keeping records that brought it into compliance with the obligations for keeping records under the permit. Based on the penalty policy as submitted to this Court at the hearing on the merits, Advantage is entitled to good faith consideration of at least 25% and not to exceed 50%. After review of the records, the ED did not cite Advantage for any record keeping deficiencies once the new procedures were implemented; however, the ED refuses to acknowledge that the records from January 2007 to September 2007 were authentic. This is a question of fact for the Court that was adequately addressed at the hearing and the ED provided no proof to the contrary. Mistakes often occur in the course of business, and Advantage provided a business records affidavit that accompanied the records from January 2007 to the present. No controverting affidavit was submitted by the ED. As a result Advantage has asked for good faith consideration and reduction in the amount of 50%.

(3) Violation 2 – Failure to keep operating hours – BFI

9. 14 monthly events were alleged by the ED at BFI; again, the clear and uncontroverted evidence establishes that Crusher No. 3 was located at BFI for only 9 months out of the possible 14 months alleged in the Complaint. As noted above, beginning in January 2007, records were kept in sufficient form to establish compliance with the conditions of the permit, these records were a part of the record before the Court as set forth in Section (2). These records were kept by the plant foreman and were not produced until additional requests and inquiries were made in May 2010. The records were provided to the ED in supplemental responses to discovery. Advantage admits that no hours of production were recorded as required in the permit for 6 months.

10. Advantage takes the position that based on the additional documentation produced by Respondent; the penalty should be reduced to reflect the actual number of months Crusher No. 3 was located at the BFI site (9) and should be adjusted to allow credit for the months that hours of operation were duly recorded (2 months). Accordingly the penalty should be reduced from 14 monthly events to 7 monthly events for a base penalty of $7,000.00; further contrary to the findings of the Court it should be noted that regardless of the alleged deficiencies the crusher was removed from BFI in February 2007 never to return; however, the ED asserts and the Court approves a fine through August 2007.

11. As noted above and throughout the trial, the initial investigation began in March 2007 for operating without a permit. The supplemental discovery responses indicate that changes were made in record-keeping beginning in January 2007. No violations were assessed for inadequate record keeping beginning in September 2007. It is the position of Advantage that it complies with the good faith criterion and should be given a reduction of 25% to 50% based upon its efforts to comply prior to the NOV and/or investigation by the TCEQ.

(4) Insufficient record-keeping for BFI and Irlbeck.

12. Advantage admits this violation and accepts the penalty of $1,156.00. However, it is interesting to note that it appears that the ED is attempting to "double dip" violations. Alleging in Violations No. 2 and No. 3 that Advantage failed to keep hours of operation, which is clearly a record-keeping violation, and again alleges a violation that is repetitive in violation No. 4.

C. STATUTES AND RULES

13. The Penalty Policy of the Texas Commission on Environmental Quality, Second Revision, September 1, 2002, page 13, "Good-Faith Efforts to Comply" provides:

> In assessing good-faith efforts to comply, staff will consider the respondent's effort to return the site to complete compliance with all applicable rules and regulations cited in the enforcement action. Thus, any reduction will be applied to all violations and events. The analysis of good-faith efforts involves two factors: the timeliness of the respondent's action(s) and the quality of that action(s). Accordingly, the respondent will be given credit for timeliness, quality or both.
>
> Timeliness is defined by the point when the respondent completed action to correct the violations. The following are the two scenarios that will be considered:
>
> * Corrective actions are completed before there is an executive director's preliminary report (EDPR) or an initial settlement offer, but the actions are completed after the issuance of an NOV.
>
> * Corrective actions are completed as soon as violations are identified and before the issuance of an NOV.
>
> Quality is defined as the degree to which the respondent took action. The two categories of quality are extraordinary and ordinary. Extraordinary is defined as action taken by the respondent which goes beyond what would be expected under the rules. Ordinary is defined as action taken by the respondent to correct the violations as expected under the rules. Good-faith efforts will not be considered for cases involving discrete violations as defined by this policy.
>
> Good faith efforts will only be considered if the respondent has achieved compliance with applicable rules and regulations cited in the enforcement action.

14. The matrix provides that there is a 50% reduction for Extraordinary Action taken before NOV and 25% for extraordinary action taken between NOV and EDPR/Settlement Offer. For Ordinary Action the corresponding percentages are 25% and 10% respectively.

15. 30 TAC 116.115(b)(2)(E) provides:

The permit holder shall: (v) retain information in the file for at least two years following the date that the information or data is obtained . . .

30 TAC 116.615 (8) states:

. . . Information and data sufficient to demonstrate applicability of and compliance with the standard permit must be retained for at least two years following the date that the information or data is obtained.

Section (M) of the standard Tier II permit states that "Written records shall be kept for a rolling 24 month period . . . "

D. ARGUMENT

16. Advantage has not disputed that there were deficiencies in the record-keeping prior to January 2007 and that it failed on at least three occasions to provide notice of intent to relocate; however, it is the number of violations and calculation of penalty that leads to the dispute.

17. As noted in paragraph 2, Advantage should be allowed to rely on limitations placed in the permit just as the ED relies on the requirements to hand down violations and penalties. There was no obligation on the part of Advantage to produce any record dating back beyond 2007. It is important to note that the ED did not request a complete set of records until 2009. Nevertheless, Advantage produced the records at its own peril in an effort to establish its compliance with an alleged violation for operating without a permit only to have these efforts at cooperation used to punish Advantage. It is the position of Advantage that the Court should not consider any records beyond 2007 in considering the existence or absence of a violation. The ED has dismissed this argument as being a non-issue. It is a non-issue because Advantage produced the documents only to have the ED use these documents to say, you are right, there is a permit, but now we are going to double your initial fine.

18. In classifying the alleged violations, in particular violations 2 and 3, the ED elected to classify the failure to keep hours of operation as a "Major" programmatic violation. The basis for alleging the violations as major was that without the hours of operation it was impossible for the ED to determine whether the Respondent was within the confines of its permit. However, the penalty policy provides that major means "that all or almost all (greater than 70%) of a rule or permit is not met." Moderate means that "much (30 to 70%) of a rule or permit requirement is not met." Advantage asserts that under the facts of this case the violation should have been classified as a moderate violation as opposed to a major. Advantage has no doubt that if the ED had been able to prove a cause of action for operating without a permit that would have been pursued due to the amount of the penalty provided by statute. Nevertheless, the ED elected to dismiss the complaint for no permit and proceed with the alleged programmatic violations.

19. If the Court finds that the violation should have been more appropriately classified as moderate, then the corresponding duration would be reduced to quarterly as opposed to monthly violations.

20. Advantage vehemently disputes the number of events for violation No. 2 and 3 as set forth in paragraphs 7 – 14. The ED has failed to prove that there were 21 monthly events for the Irlbeck Site and 14 for the BFI Site. The argument of the ED has been that they could not tell where the crusher was located and as such they are going to cite for every month from the

initiation of the permit. They maintain this position in spite of the fact that violation No. 1 asserts 4 occasions of moving the crusher without authorization. There is no obligation to keep hours of production when the crusher is not at the site.

21. The TCEQ penalty officer repeatedly refused to admit on cross-examination that the records from January 2007 were adequate to meet the requirements of the permit, but did admit that the records contained start and stop time, hourly production and total daily production. The entire basis of violation number 2 and 3 is that there was an absolute failure to "keep records of operating hours as specifically required by the permit and necessary for determining compliance with the permit." The ED cannot now change positions and assert that there were other deficiencies that warrant the penalty alleged for this very specific violation.

22. The Court adopts the findings of fact and conclusions of law of the ED without exception, holding that the ED is correct in asserting that the violations were an on-going failure to demonstrate compliance; nevertheless, the Court allows the ED to carry that penalty forward on the Irlbeck Site to include a time period when the records had been corrected and Advantage was operating under a new permit. Further, the rules and regulations propounded are ambiguous and allow the ED to cherry pick violations while making it impossible for Advantage to defend itself from the ever changing allegations from the ED.

23. The Court dismisses out of hand the issue of good faith consideration stating that failure to demonstrate compliance as to all violations voids Respondent's eligibility. Again, violation 1 was for failure to notify of a move. Those are violations that occur and cannot be corrected except to implement a policy to ensure notification in the future, which Advantage has done. Violation 2 and 3 deal with record-keeping deficiencies such that the ED is unable to verify compliance. The records produced by Advantage clearly demonstrate the substantial efforts were taken in January 2007 to correct record-keeping deficiencies and again those changes were made without the involvement of the TCEQ. Finally, violation 4 was addressed in the changes made to the internal procedures of Advantage in January 2007 and each of the concerns were addressed in a proactive form by Advantage. Failure to apply good-faith consideration to the penalty is an abuse of discretion by the Court.

E. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

24. The Court finds that violation number 1 is admitted by Advantage Asphalt Products and that the penalty proposed by the Executive Director for violation number 1 is accepted.

25. The Court finds that Advantage Asphalt Products failed to maintain hours of operation at the Irlbeck Site on 4 separate monthly occasions as evidenced by the records submitted to this Court.

26. The Court finds that Advantage Asphalt Products failed to maintain hours of operation at the BFI Site on 6 separate monthly occasions as evidenced by the records submitted to this Court.

27. The Court finds that Advantage Asphalt Products revised its record-keeping procedure in January 2007 to a form that is in compliance with the requirements of the permit.

28. The Court finds that the efforts of Advantage Asphalt Products to revise its record-keeping procedures occurred before any investigation and/or notice of violation was initiated by the TCEQ.

29. The Court finds that Advantage Asphalt Products is entitled to consideration of good faith efforts to comply as defined in the TCEQ Penalty Policy and that the amount of said good faith consideration should be 50%.

30. The Court finds that violation number 4 is admitted by Advantage Asphalt Products and that the penalty proposed by the Executive Director is accepted.

31. The Court orders the Executive Director to recalculate the penalty based on these findings of fact.

Respectfully submitted,

s/Scotty Knutson
ADVANTAGE ASPHALT PRODUCTS, LTD. Pro Se
By: Scotty Knutson, Partner
P. O. Box 51772
Amarillo, TX 79007-3001

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing was electronically filed, on this 30 day of March, 2011 as follows:

Ms. Jennifer Cook
Texas Commission on Environmental Quality
Litigation Division
MC-175 P. O. Box 13087
Austin, TX 78711-3087

Mr. Blas J. Coy, Jr.
Texas Commission of Environmental Quality
Office of Public Interest Counsel
P. O. Box 13087, MC-109
Austin, TX 78711-3087

Mr. Les Trobman
General Counsel
Texas Commission on Environmental Quality
MC-175 P. O. Box 13087
Austin, TX 78711-3087

s/Scotty Knutson
Scotty Knutson